

The Honorable Frank R. Alley

Daniel P. Pepple  
PEPPLE JOHNSON CANTU & SCHMIDT, PLLC  
1501 Western Avenue, Suite 600  
Seattle, WA 98101  
T: 206.625.1711  
E: dpepple@pjcs.com

and

Arnold M. Willig  
HACKER & WILLIG, INC., P.S.  
1501 Fourth Avenue, Suite 2150  
Seattle, WA 98101  
T: 206.340.1935  
E: arnie@hackerwillig.com

*Attorneys for Creditor – Bank of America*

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In re:

ARLIE & COMPANY,  
  
Debtor.

Case No. 10-60244-aer11

**MOTION TO COMPEL  
APPOINTMENT OF A  
BANK OF AMERICA  
REPRESENTATIVE TO THE  
CREDITORS' COMMITTEE**

**I. INTRODUCTION**

Bank of America, N.A. (herein, "Bank of America"), appearing by and through its counsel, PEPPLE JOHNSON CANTU & SCHMIDT, PLLC, and HACKER & WILLIG, INC., P.S., moves this Court for an order compelling the U.S. Trustee to appoint a representative of Bank of America to the Creditors' Committee in this case pursuant to 11 U.S.C. § 1102(a)(4) so the

1 interests of unsecured, non-trade creditors are fully represented in the administration of this  
2 case.

## 3 **II. EVIDENCE RELIED UPON**

4 This Motion is supported by the concurrently filed Declarations of Daniel Pepple  
5 (“Pepple Decl.”) and Jo Ann Tallerico (“Tallerico Decl.”), the records on file herein, and is  
6 based upon the facts more fully set forth below.

## 7 **II. FACTUAL BACKGROUND**

### 8 ***A. Procedural Posture***

9 On or about January 20, 2010, the Debtor, Arlie & Company (the “Debtor” or, “Arlie &  
10 Co.”), filed a voluntary petition for Chapter 11 bankruptcy relief. On or about January 25, 2010,  
11 the current Creditors’ Committee was appointed by the U.S. Trustee. On July 1, 2010, the  
12 Debtor submitted its first proposed Plan of Reorganization. Bank of America and Umpqua  
13 Bank both objected to the Plan. No objection was raised or filed by the Creditors’ Committee.  
14 The Debtor then submitted a first Amended Plan of Reorganization and Disclosure Statement  
15 on or about January 11, 2011. Again, the Creditors’ Committee appeared to not be taking an  
16 active role in the negotiations of the proposed Plan on behalf of unsecured creditors. Recently,  
17 on February 14, 2011, the Debtor submitted a second Amended Plan of Reorganization and  
18 Disclosure Statement. Once again, the Creditors’ Committee raised no issues or objections. *See*  
19 *Tallerico Decl.*, ¶ 8.

### 20 ***B. Creditors’ Committee Composition***

21 The Creditors’ Committee currently consists of representatives from five (5) unsecured,  
22 trade creditors: JRH Transportation Engineering; Balzhiser & Hubbard Engineers, Inc.; Eugene  
23 Sand & Gravel; Rowell Brokaw Architects, PC; and Fabrication & Mechanical Group Inc. *See*  
24 *Tallerico Decl.*, ¶ 7. Unsecured, non-trade creditors are not represented on the Committee,  
25 despite the fact that they make up the majority of the unsecured class of claims.

26 The Creditors’ Committee has neither taken an active role in investigating the feasibility

1 of the Debtors' proposed Plan, Tallerico Decl., ¶ 8, nor has the Committee authorized its  
2 counsel to undertake any substantial discovery.

3 It is especially important at this stage in the case for the Committee to have a member  
4 who is an active participant in the reorganization process, and who is not a trade creditor that  
5 may be looking to the reorganized debtor for further services. Bank of America is perhaps the  
6 single largest non-trade, unsecured creditor in this case, and is ready and willing to serve on the  
7 Committee. Tallerico Decl., ¶¶ 6, 9. The U.S. Trustee's Office should therefore be compelled  
8 to appoint Bank of America as a Committee member.

### 9 III. LEGAL AUTHORITY & ARGUMENT

#### 10 A. 11 U.S.C. § 1102(a)(4)

11 11 U.S.C. § 1102(a)(4) provides, in part, that:

12 On request of a party in interest and after notice and a hearing, the court may order  
13 the United States trustee to change the membership of a committee appointed  
14 under this subsection, if the court determines that the change is necessary to ensure  
15 adequate representation of creditors ....

16 (West 2011 Ed.)

17  
18 Upon request to change the membership of a committee, the court reviews the decision of  
19 the United States trustee *de novo*. See *In re Enron Corp.*, 279 B.R. 671, 684 (Bankr. S.D.N.Y. 2002)<sup>1</sup>  
20 (reviewing *de novo* the United States trustee's decision not to appoint an additional committee).

21 The Bankruptcy Code fails to define "adequate representation," however courts have  
22 considered non-exclusive factors in analyzing the adequacy of representation. Of particular  
23 significance to Bank of America's request for appointment to the Committee, this Court should  
24 consider: (1) the treatment of different classes under a plan and need of representation; (2) the

25 <sup>1</sup> The cases cited throughout *In re Enron* involve the formatin of a separate committee pursuant to 11 U.S.C. §  
26 1102(a)(2); yet, the principle and analysis with respect to "adequate representation" are applicable to the  
considerations of that term as it applies under 11 U.S.C. § 1102(a)(4).

motivation of the movants; and (3) the delay and additional costs of granting the motion. *In re Dana Corp.*, 344 B.R. 35, 38 (Bankr. S.D.N.Y. 2006) (citations omitted); *In re Agway Inc.*, 297 B.R. 371, 374 (Bankr. N.D.N.Y. 2003) (citations omitted); *Enron Corp.*, 279 B.R. at 685 (citations omitted). Such a factor-specific analysis, however, should be made on a case-by-case basis, with no single factor being dispositive. *Dana*, 344 B.R. at 38 (citing *In re Kalvar Microfilm*, 195 B.R. 599, 601 (Bankr. D. Del. 1996)).

i. Treatment of Different Classes – Adequate Representation

Adequate representation “lies not in the uniqueness of a single claim but ‘in the nature of the case and the composition of the committee.’” *In re Drexel Burnham Lambert Group, Inc.*, 118 B.R. 209, 212 (Bankr. S.D.N.Y. 1990) (quoting *In re McLean Indus., Inc.*, 70 B.R. 852, 861 (Bankr. S.D.N.Y. 1987). “What is required is the adequate representation of various creditor types.” *In re Hills Stores Co.*, 137 B.R. 4, 7 (Bankr. S.D.N.Y. 1996).

A creditors’ committee need not reflect the exact composition of the entire assemblage of unsecured creditors, nonetheless a committee should adequately represent the various creditor types. *Dana*, 344 B.R. at 38. In *Dana*, where the creditors’ committee consisted of a “diverse group of creditors, including: representatives of bondholders, an indenture trustee, a labor union, trade creditors and an asbestos claimant[,]” the court held that the creditors’ committee was heterogeneous enough to adequately represent all creditors. *Id.* at 38–39. No such heterogeneity exists in this case.

At present, the Creditors’ Committee in this case consists solely of trade creditors whose primary interest may be preserving the Debtor’s existence in the hope of their own future business with the Debtor. Although a legitimate objective, this objective does not represent the interests of non-trade creditors such as Bank of America and other creditors similarly disinterested in salvaging the going concern of the Debtor. Bank of America should therefore be appointed to the Creditors’ Committee to represent those unsecured creditors who simply desire to get paid on their respective claims.

1                   ii.       Motivation of Bank of America – Failure of Fiduciary Duties

2           A creditors' committee is formed with the intended purpose of representing the  
3       "necessarily different interests and concerns of the creditors it represents." *Enron*, 279 B.R. at 685.  
4       "Like counsel to Creditors' Committees, committee members are 'fiduciaries' who 'have  
5       obligations of fidelity, undivided loyalty and impartial service' to the interests of *all* creditors in  
6       their actions in their capacities as Committee members." *In re Grant Broadcasting of Philadelphia, Inc.*,  
7       71 B.R. 655, 664, (Bankr. E.D. Pa. 1987), *citing In re Mesta Machine Co.*, 67 B.R. 151, 156 (Bankr.  
8       W.D.Pa. 1986) (emphasis original). As currently composed, the Creditors' Committee has failed in  
9       its fiduciary obligations and requirement of impartial services to *all* unsecured creditors. The  
10      Debtor proposes a plan of reorganization providing for full payment to unsecured creditors over  
11      five years at a 3.5% annual interest rate. As put forth by the Debtor, funds to pay unsecured  
12      creditors are proposed to come from the liquidation of the Debtors' real property and cash flow  
13      from operations. Yet, the Creditors' Committee has neither taken an active role in investigating  
14      feasibility of the Debtor's Plan, nor authorized its counsel to undertake any substantial discovery.  
15      It is imperative that the Committee determine the feasibility of the Debtor's proposed Plan and  
16      whether the proposed terms of payment actually constitute full payment to unsecured creditors.  
17      Such an investigation is best accomplished by appointing a Bank of America representative (i.e, a  
18      non-trade creditor) to the existing Creditors' Committee.

19                   iii.       Timing of Appointment and Additional Costs of Granting this Motion

20           Bank of America's interest to be appointed to the Creditor's Committee arose only upon  
21      the Committee's inaction and failure to act as a fiduciary for all creditors. It was only upon an  
22      appraisal of its collateral that Bank of America discovered that the Debtor was "underwater" on  
23      its loan to the Bank.<sup>2</sup> It was then that the Bank realized it had a very substantial unsecured  
24      deficiency claim against the Debtor.<sup>3</sup> Thus, after appointment of the Committee and only upon

25      <sup>2</sup> On February 1, 2011, Bank of America filed an Amended Proof of Claim showing a claim of \$5,470,988.48,  
26      secured by collateral valued at \$4,000,000. The unsecured deficiency claim was therefore valued at \$1,470,988.48.

<sup>3</sup> "A secured creditor whose claim exceeds the value of its collateral and holds, in part, an unsecured claim, may be

discovery of such unsecured deficiency did Bank of America timely seek the approval of the U.S. Trustee for its appointment on the Committee. Bank of America succinctly outlined its concerns to the U.S. Trustee and requested that it be appointed to the Committee. Exhibit A to Pepple Decl., ¶ 3. The U.S. Trustee declined to appoint Bank of America as an additional member without explanation. Thus, Bank of America was compelled to bring this motion.

***B. 11 U.S.C. § 1102(b)(1)***

11 U.S.C. § 1102(b)(1) provides, in part, that:

A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor ...

(West 2011 Ed.)

Claimants with the most substantial monetary claims are entitled to representation on the committee. *See, e.g., Grant Broadcasting*, 71 B.R. at 660; *In re Salant Corp.*, 53 B.R. 158, 160-62 (Bankr. S.D.N.Y. 1985); *In re Daig Corp.*, 17 B.R. 41, 42-43 (Bankr. D. Minn. 1981).

Here, Bank of America is one of the largest unsecured creditors in the Debtors' bankruptcy case. Currently, the Creditors' Committee has only five members. With two positions open on the Committee and Bank of America holding a substantial unsecured claim, it is therefore appropriate that Bank of America be appointed to the Committee.

***C. 11 U.S.C. § 105(a)***

A court may invoke its inherent powers of 11 U.S.C. § 105(a) "to assure that the United States trustee does not act arbitrarily and capriciously" in the appointment of parties-in-interest to a creditors' committee. *See In re Plabell Rubber Products*, 140 B.R. 179, 181 (Bankr. N.D. Ohio 1992). Pursuant to its inherent power, a court may expand the membership of the existing committee. *See In re Sharon Steel Corp.*, 100 B.R. 767, 774 (Bankr. W.D. Pa. 1989).

---

appointed to the unsecured creditors' committee under § 1102. *In re Walat Farms, Inc.*, 64 B.R. 65, 68-69 (Bankr. E.D. Mich. 1986).

Upon motion of a party-in-interest or upon its own motion, a court may review the United States trustee's administrative task of appointing committee members. *In re First Republicbank Corp.*, 95 B.R. 58, 60 (Bankr. N.D.Tex. 1988). The U.S. Trustee has apparently acted arbitrarily in denying Bank of America's appointment to the Creditors' Committee. Bank of America's appointment is necessary pursuant to the arguments put forth above. It is within this Court's inherent powers, pursuant to § 105(a), to add a Bank of America representative to the Committee, thereby expanding its current membership to achieve the best results possible for an effective reorganization.

#### IV. RELIEF REQUESTED

Bank of America requests that its representative be appointed to the Creditors' Committee, thereby ensuring that the interests and concerns of unsecured, non-trade creditors have a voice as to the proposed treatment under the Debtor's Plan. Accordingly, Bank of America seeks an order pursuant to 11 U.S.C. §§ 1102(a)(4) and 105(a) to be appointed as a member to the Creditors' Committee.

///

///

///

///

///

///

///

///

///

///

///

///

**V. CONCLUSION**

In order to ensure fairness and adequate representation of all classes of unsecured creditors in this case, the Court is respectfully requested to enter an order compelling the U.S. Trustee to appoint Bank of America as a member of the Creditors' Committee. A proposed form of order is submitted with this motion.

DATED this 1<sup>st</sup> day of March, 2011.

Respectfully submitted,

PEPPLE JOHNSON CANTU & SCHMIDT, PLLC

/s/ Daniel P. Pepple (via email authorization)

Daniel P. Pepple, OSB #030628

Attorneys for Bank of America

HACKER & WILLIG, INC., P.S.

/s/ Arnold M. Willig

Arnold M. Willig, OSB #070188

Attorneys for Bank of America



# EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In re:

ARLIE & COMPANY,  
  
Debtor.

Case No. 10-60244-aer11

**ORDER GRANTING MOTION TO  
COMPEL APPOINTMENT OF A  
BANK OF AMERICA  
REPRESENTATIVE TO THE  
CREDITORS' COMMITTEE**

**[PROPOSED]**

The Court, after considering Bank of America's Motion to Compel Appointment of a Bank of America Representative to the Creditors' Committee, and after considering the opposition thereto, if any, and the files and records herein, and finding that notice of the motion was sufficient and being fully advised in the premises, now, therefore, it is hereby:

///

///

///

**ORDER COMPELLING APPOINTMENT  
TO CREDITORS' COMMITTEE - 1**

**HACKER & WILLIG, INC., P.S.**  
ATTORNEYS AT LAW  
1501 Fourth Avenue, Suite 2150  
Seattle, Washington 98101-3225  
Telephone (206) 340-1935

1           ORDERED that, pursuant to 11 U.S.C. §§ 1102(a)(4) and 105(a), the U.S. Trustee is  
2 hereby ordered to appoint Bank of America's representative Jo Ann Tallerico to the Creditors'  
3 Committee in the Debtor's Chapter 11 bankruptcy case.

4           **PRESENTED, AND CERTIFIED, BY:       ###**

5           PEPPLE JOHNSON CANTU & SCHMIDT, PLLC

6  
7           /s/ Daniel P. Pepple (via email approval)

8           Daniel P. Pepple, OSB #030628  
9           Attorneys for Bank of America

10           HACKER & WILLIG, INC., P.S.

11           /s/ Arnold M. Willig

12           Arnold M. Willig, OSB #070188  
13           Attorneys for Bank of America

14           Interested Parties:

15           Debtor:

16           Arlie & Company  
17           2911 Tennyson Ave., #400  
18           Eugene, OR 97408

19           Debtor's Attorneys:

20           Brad T. Summers  
21           Justin D. Leonard  
22           101 SW Main #1100  
23           Portland, OR 97204

24           Douglas R. Wilkinson  
25           1011 Harlow Rd #300  
26           Springfield, OR 97477

          John D. Fiero  
          150 California St. – 15<sup>th</sup> Floor  
          San Francisco, CA 94111-4500

          ///

          ///

**ORDER COMPELLING APPOINTMENT  
TO CREDITORS' COMMITTEE - 2**

**HACKER & WILLIG, INC., P.S.**

ATTORNEYS AT LAW  
1501 Fourth Avenue, Suite 2150  
Seattle, Washington 98101-3225  
Telephone (206) 340-1935

Jonathan Polland  
Rethink LLP  
465 California St. #310  
San Francisco, CA 94104

Linda F. Cantor  
Teddy M. Kapur  
10100 Santa Monica Blvd – 11<sup>th</sup> Floor  
Los Angeles, CA 90067

Michael P. Kearney  
POB 1758  
Eugene, OR 97440

U.S. Trustee:  
U.S. Trustee  
405 E. 8<sup>th</sup> Ave #1100  
Eugene, OR 97401-2706

U.S. Trustee's Attorney:  
P. Rebecca Kamitsuka  
405 E. 8<sup>th</sup> Ave #1100  
Eugene, OR 97401-2706

Cred. Comm. Chair:  
James R. Hanks  
JRH Transportation Engineering  
4765 Village Plaza LP #201  
Eugene, OR 97401

Creditor Committee:  
David E. Bomar  
Balzhiser & Hubbard Engineers, Inc.  
100 W. 13<sup>th</sup> Ave  
Eugene, OR 97401

Mike Broadsword  
Eugene Sand & Gravel  
POB 1067  
Eugene, OR 97440

Gregory Brokaw  
Rowell Brokaw Architects, PC  
1 East Broadway #300  
Eugene, OR 97401  
///

**ORDER COMPELLING APPOINTMENT  
TO CREDITORS' COMMITTEE - 3**

**HACKER & WILLIG, INC., P.S.**  
ATTORNEYS AT LAW  
1501 Fourth Avenue, Suite 2150  
Seattle, Washington 98101-3225  
Telephone (206) 340-1935

1 Jerry Vicars  
2 Fabrication & Mechanical Group Inc.  
3 POB 42173  
4 Eugene, OR 97404

5 Attorney for Unsecured Creditors Committee:  
6 Douglas R. Schultz  
7 POB 1147  
8 Eugene, OR 97440

9 Special Notice:  
10 John C. Fisher  
11 767 Willamette St. #201  
12 Eugene, OR 97401

13 James R. Hanks  
14 JRH Transportation Engineering  
15 4765 Village Plaza LP #201  
16 Eugene, OR 97401

17 NW Natural Gas Co.

18 Michael Roberts  
19 1919 Myers Rd.  
20 Eugene, OR 97401

21 WmThomas Construction  
22 POB 2409  
23 Florence, OR 97439

The Honorable Frank R. Alley

Daniel P. Pepple  
PEPPLE JOHNSON CANTU & SCHMIDT, PLLC  
1501 Western Avenue, Suite 600  
Seattle, WA 98101  
T: 206.625.1711  
E: dpepple@pjcs.com

Arnold M. Willig  
HACKER & WILLIG, INC., P.S.  
1501 Fourth Avenue, Suite 2150  
Seattle, WA 98101  
T: 206.340.1935  
E: arnie@hackerwillig.com

*Attorneys for Creditor – Bank of America*

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In re:

ARLIE & COMPANY,  
  
Debtor.

Case No. 10-60244-aer11

**DECLARATION OF DANIEL PEPPLE  
IN SUPPORT OF BANK OF  
AMERICA'S MOTION TO COMPEL  
APPOINTMENT OF A BANK OF  
AMERICA REPRESENTATIVE TO  
THE CREDITORS' COMMITTEE**

I, Daniel Pepple, declare, under oath, as follows:

1. I am a citizen of the United States of America over eighteen (18) years of age and I am competent to make this declaration. The statements contained in this declaration are based upon my personal knowledge. I would reaffirm and restate these statements in any proceeding.
2. I am a member of the law firm of PEPPLE JOHNSON CANTU & SCHMIDT, PLLC, the attorneys for Bank of America, a creditor in the Debtor's Chapter 11 bankruptcy proceeding. I

**DECLARATION OF DANIEL PEPPLE - 1**

PEPPLE JOHNSON  
CANTU & SCHMIDT, PLLC  
1501 Western Avenue, Suite 600  
Seattle, Washington 98101  
(206) 625-1711 - FACSIMILE (206) 625-1627

1 am authorized to make the statements contained herein, and I make this declaration in support of  
 2 Bank of America's Motion to Compel Appointment of a Bank of America Representative to the  
 3 Creditors' Committee.

4 3. On or about February 18, 2011, I executed and delivered to Rebecca P. Kamitsuka,  
 5 Attorney for the United States Trustee, a letter requesting that the United States Trustee appoint  
 6 Jo Ann Tallerico, as Bank of America's representative, to the Creditors' Committee in the  
 7 Debtor's Chapter 11 bankruptcy case. In short, the letter outlines Ms. Tallerico's familiarity with  
 8 the Debtor's loans, the inactivity of the Creditors' Committee as currently composed, and that the  
 9 appointment of Ms. Tallerico on behalf of Bank of America is necessary to encourage the  
 10 Committee to fulfill its fiduciary obligations to all unsecured creditors. A true and correct copy of  
 11 the letter is attached hereto as Exhibit A.

14 4. On or about February 23, 2011, I received a response from the United States  
 15 Trustee summarily denying the appointment of a Bank of America representative to the Creditors'  
 16 Committee.

17 I declare that the foregoing is true and correct under penalty of perjury under the laws of  
 18 the state of Oregon.

20 DATED this 24 day of February, 2011, at Seattle, Washington.

22 PEPPLE JOHNSON CANTU & SCHMIDT, PLLC

24 Daniel P. Pepple, OSB #030628  
 25 Attorneys for Bank of America  
 26

# EXHIBIT A



**PEPPLE JOHNSON CANTU & SCHMIDT, PLLC**  
*Lawyers*

1501 WESTERN AVENUE, SUITE 600  
SEATTLE, WASHINGTON 98101  
PHONE: (206) 625-1711 FAX: (206) 625-1627  
www.pjcs.com

**Daniel P. Pepple**  
dpepple@pjcs.com  
Direct Line: (206) 625-9960

**Florida Office**  
2430 Estancia Boulevard, Suite 114  
Clearwater, FL 33761  
Phone: (727) 724-8585 Fax: (727) 726-9272

February 7, 2011

Rebecca P. Kamitsuka  
Attorney for the United States Trustee  
United States Department of Justice  
Wayne L. Morse Courthouse  
405 E. 8th Avenue, Suite 1100  
Eugene OR 97401-2706

Re: **Arlie & Company**  
**Case No. 10-60244-aer11**

Dear Ms. Kamitsuka:

As you know, we represent Bank of America, N.A. in this matter. In addition to being a secured creditor, Bank of America has an unsecured deficiency claim which makes it the debtor's largest unsecured creditor. I am writing to request that the United States Trustee appoint Jo Ann Tallerico as a representative of Bank of America to the committee of creditors holding unsecured claims. Ms. Tallerico is a senior vice president of Bank of America and is the officer responsible for the Arlie credits.

By way of background, an Amended Proof of Claim (Claim 211) was recently filed by Bank of America with respect to its loan to the debtor secured in part by real property owned by the debtor located at 2911 Tennyson Ave., Eugene, Oregon. As of the petition date in this case, the amount owing Bank of America with respect to that loan was \$5,470,988.48. As indicated in the Amended Proof of Claim, the value of the collateral securing the loan is \$4,000,000 resulting in an unsecured deficiency claim of \$1,470,988.48. That unsecured deficiency claim makes Bank of America the largest unsecured creditor of the debtor. (The proposed Plan of Reorganization filed by the debtor on January 11, 2011, indicates that the amount of Bank of America's allowed secured claim with respect to this loan is \$4,200,000 which was the amount in the Proof of Claim previously filed on December 14, 2010, which has now been amended by the Amended Proof of Claim filed on February 1, 2011. Even at that amount, Bank of America's deficiency claim would be the largest unsecured claim.)

February 7, 2011  
Page 2

As you know, the unsecured creditors' committee typically consists of the seven unsecured creditors holding the largest claims. As of now, there are five members and the creditors holding the largest unsecured claims, Bank of America and Fifth Third Bank are not included. Depending on the outcome of the pending adversary proceeding involving Pioneer Investment and its disputed lien on the Hawaii property, Pioneer may be among the three largest unsecured creditors.

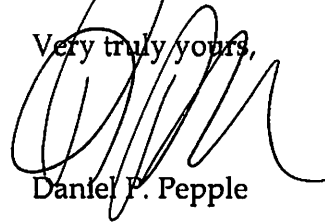
The debtor's proposed Plan of Reorganization provides for payment in full of the unsecured creditors over five years at 3.5% interest. According to the proposed Plan and the draft Disclosure Statement, the funds to pay the unsecured creditors are to come from sales of property and cash flow from operations. It is of critical importance to the unsecured creditors to determine the feasibility of that portion of the Plan and to determine whether the terms of payment proposed in the Plan actually constitute payment in full. In those respects, the interests of Bank of America with respect to its deficiency claim and the interests of the other unsecured creditors are identical.

Those interests are protected only by a diligent and vigorous investigation of plan feasibility including determining the validity of the debtor's opinions of value and its projections of cash flow and determining whether the prospects of payment in full of the unsecured creditors would be greater if the debtor were liquidated rather than reorganized. Thus far in this case, the unsecured creditors' committee has not taken an active role in investigating plan feasibility and has not authorized its counsel to undertake any substantial discovery. The current membership of the committee is comprised of trade creditors whose primary interest may be preserving the debtor's existence in the hope of future business. While that may be a legitimate objective, it is not representative of the interests of non-trade creditors such as Bank of America whose only interest is in getting paid on this claim. At present, that point of view is absent from the committee and it deserves representation. We submit that the committee cannot fulfill its fiduciary obligation to the unsecured creditors, including Bank of America, without a diligent investigation of plan feasibility. Obviously, adding a Bank of America representative to the committee will not permit the Bank to control the committee, as she will only have one vote. However, the Bank of America representative may successfully encourage the committee members to fulfill their fiduciary obligations to all of the unsecured creditors by authorizing committee counsel to diligently investigate plan feasibility.

February 7, 2011  
Page 3

We look forward to hearing from you on this matter. If you need any further information in order to respond to this request please let me know.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Daniel P. Pepple', written over the typed name.

Daniel P. Pepple

cc: Bank of America  
Douglas R. Schultz  
Arnold Willig

The Honorable Frank R. Alley

Daniel P. Pepple  
PEPPLE JOHNSON CANTU & SCHMIDT, PLLC  
1501 Western Avenue, Suite 600  
Seattle, WA 98101  
T: 206.625.1711  
E: dpepple@pjcs.com

Arnold M. Willig  
HACKER & WILLIG, INC., P.S.  
1501 Fourth Avenue, Suite 2150  
Seattle, WA 98101  
T: 206.340.1935  
E: arnie@hackerwillig.com

*Attorneys for Creditor – Bank of America*

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In re:

ARLIE & COMPANY,  
  
Debtor.

Case No. 10-60244-aer11

**DECLARATION OF JO ANN  
TALLERICO IN SUPPORT OF BANK  
OF AMERICA'S MOTION TO  
COMPEL APPOINTMENT OF A  
BANK OF AMERICA  
REPRESENTATIVE TO THE  
CREDITORS' COMMITTEE**

I, Jo Ann Tallerico, declare, under oath, as follows:

1. I am a citizen of the United States of America over eighteen (18) years of age and I am competent to make this declaration. The statements contained in this declaration are based upon my personal knowledge. I would reaffirm and restate these statements in any proceeding.

2. I am a Senior Vice President for Bank of America, N.A. (herein, "Bank of

America"). I am the officer responsible for the Debtor's loans, the related real property collateral documents regarding Bank of America's loans to the Debtor, and the payment history on the Debtor's loan accounts. I am qualified to make this declaration, and I am one of the records custodians responsible for this account. Bank of America is the present holder of the Debtor's original promissory notes and other loan documents, and during the course of regularly conducted business activity, those documents remain in the original loan file.

3. **Proof of Claim.** On or about December 14, 2010, Bank of America filed a Proof of Claim in the Debtor's Chapter 11 bankruptcy case secured by real property located on or about 2750 Shadow View Drive, Eugene, Oregon 97408 ("Building A"). As of the Debtor's filing of its voluntary petition, Bank of America's claim was for \$8,980,268.27. Building A is valued at \$10,810,000.00; thus, Bank of America's claim is fully secured.

4. **Amended Proof of Claim.** On or about February 1, 2011, Bank of America filed an Amended Proof of Claim in the Debtor's Chapter 11 bankruptcy case secured by real property located on or about 2911 Tennyson Avenue, Eugene, Oregon 97408 ("Building B"). As of the Debtor's filing of its voluntary petition, Bank of America's claim was for **\$5,470,988.48**. Building B is valued at \$4,000,000.00; thus, Bank of America's claim is only partially secured.

5. **Unsecured Deficiency Claim.** Based on the facts as outlined in Paragraph 4 above, Bank of America's claim against Building B is unsecured in the amount of approximately **\$1,470,988.48**. Bank of America therefore has a substantial unsecured deficiency claim against the Debtor.

6. **Second Largest Unsecured Creditor.** To the best of my knowledge, Bank of

1 America's unsecured claim for approximately \$1,470,988.48 makes it the second largest unsecured  
2 creditor in the Debtor's Chapter 11 bankruptcy case.

3 7. **Necessity for an Unsecured, Non-trade Creditor.** As currently composed, the  
4 Creditors' Committee consists of five members, all of which are unsecured trade creditors.  
5 Unsecured, non-trade creditors are therefore unrepresented on the Committee. Bank of America  
6 is an unsecured, non-trade creditor and, if appointed to the Creditors' Committee, would act on  
7 behalf of other unsecured, non-trade creditors.  
8

9 8. **Inactivity of Creditors' Committee.** Throughout the Debtor's Chapter 11 case,  
10 the Debtor has submitted a first proposed Plan of Reorganization, a first Amended Plan of  
11 Reorganization, and a second Amended Plan of Reorganization. To each of these submissions,  
12 the Creditors' Committee has raised no issues or objections. In all, the Creditors' Committee has  
13 generally been inactive in investigating the feasibility of the Debtor's currently proposed Plan.  
14

15 9. **Willingness to Serve.** I am fully capable, ready and willing to serve on the  
16 Creditors' Committee as Bank of America's duly-appointed representative. I am committed to  
17 representing the interests of unsecured, non-trade creditors.  
18

19 10. **Not an Insider.** I am not, nor to the best of my knowledge is any other Bank of  
20 America employee, an insider to the Debtor's Chapter 11 bankruptcy case.

21 ///

22 ///


23 ///

24 ///

25 ///

1 I declare that the foregoing is true and correct under penalty of perjury under the laws of  
2 the state of Oregon.

3 DATED this 28 day of February, 2011, at Las Vegas, Nevada.

4   
5  
6 Jo Ann Tallerico, Senior Vice President  
7 Bank of America, N.A.  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

The Honorable Frank R. Alley

Daniel P. Pepple  
PEPPLE JOHNSON CANTU & SCHMIDT, PLLC  
1501 Western Avenue, Suite 600  
Seattle, WA 98101  
T: 206.625.1711  
E: dpepple@pjcs.com

and

Arnold M. Willig  
HACKER & WILLIG, INC., P.S.  
1501 Fourth Avenue, Suite 2150  
Seattle, WA 98101  
T: 206.340.1935  
E: arnie@hackerwillig.com

*Attorneys for Creditor – Bank of America*

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In re:

ARLIE & COMPANY,  
  
Debtor.

Case No. 10-60244-aer11

**CERTIFICATE OF SERVICE**

I, Deborah R. Joslin, under oath, declare:

1. I am a citizen of the United States of America, over eighteen years of age.
2. I make this declaration based upon my personal knowledge and am competent to testify to the matters contained herein.
3. I am an employee of Hacker & Willig, Inc., P.S., attorneys for Creditor, Bank of America.
4. On March 1, 2010, I caused to be served via electronic filing true and correct copies



of Bank of America's **Motion to Compel Appointment of a Bank of America Representative to the Creditors' Committee w/attached proposed Order, Declaration of Daniel Pepple in Support of Bank of America's Motion to Compel Appointment of a Bank of America Representative to the Creditors' Committee w/attached Exhibit A, and Declaration of Jo Ann Terllerico in Support of Bank of America's Motion to Compel Appointment of a Bank of America Representative to the Creditors' Committee** upon all parties registered with ECF in this case:

- JOHN D ALBERT    darlene@albertandtweet.com, beth@albertandtweet.com
- JOHN F BARG    jfb@bcltlaw.com, cgw@bcltlaw.com
- LINDA F CANTOR    lcantor@pszjlaw.com
- CONRAD K CHIU    cchiu@pryorcashman.com
- BRADLEY S COPELAND    bcopeland@agsprp.com, soconnor@agsprp.com
- JOHN D FIERO    jfiero@pszjlaw.com,  
ocarpio@pszjlaw.com;ksuk@pszjlaw.com;azaragoza@pszjlaw.com
- MICHAEL W FLETCHER    michael.fletcher@tonkon.com, tammy.brown@tonkon.com
- THOMAS A HUNTSBERGER    tom@tahpc.com
- Thomas A Huntsberger    thuntsberger@ecf.epiqsystems.com
- P REBECCA KAMITSUKA
- TEDDY M KAPUR    tkapur@pszjlaw.com, slee@pszjlaw.com
- MICHAEL P KEARNEY    mpk@kearneyatlaw.com, mholley@agsprp.com
- ALBERT N KENNEDY    al.kennedy@tonkon.com,  
leslie.hurd@tonkon.com;larissa.stec@tonkon.com
- JUSTIN D LEONARD    jleonard@bjllp.com, jweisenbach@balljanik.com
- JOHN CASEY MILLS    casey.mills@millernash.com, brenda.hale@millernash.com
- WILSON C MUHLHEIM    ecf@mb-lawoffice.com
- P SCOTT McCLEERY    scottm@gartlandnelsonlaw.com, kassiea@gartlandnelsonlaw.com
- FRANK F MCGINN    ffm@bostonbusinesslaw.com
- ANDREW P PARKS    aparks@agsprp.com, lstevenson@agsprp.com
- TERESA H PEARSON    teresa.pearson@millernash.com,  
lisa.conrad@millernash.com;brenda.hale@millernash.com
- DANIEL P PEPPE    dpepple@pjcs.com, dawnanderson9@pjcs.com;jsteinert@pjcs.com
- JACKSON SCHMIDT    jacksonschmidt@pjcs.com,  
dawnanderson9@pjcs.com;jsteinert@pjcs.com
- DOUGLAS R SCHULTZ    schultz@gleaveslaw.com, kirsten@gleaveslaw.com
- BRAD T SUMMERS    tsummers@balljanik.com, akimmel@balljanik.com
- US Trustee, Eugene    USTPRegion18.EG.ECF@usdoj.gov

- PATRICK W WADE hhecfb@hershnerhunter.com
- HEATHER M WALLOCH heatherw@gartlandnelsonlaw.com,  
kassiea@gartlandnelsonlaw.com
- GILBERT B WEISMAN notices@becket-lee.com
- DOUGLAS R WILKINSON doug@thorp-purdy.com, skelley@thorp-purdy.com
- ARNOLD M WILLIG arnie@hackerwillig.com,  
debbie@hackerwillig.com; donna@hackerwillig.com; eshea@hackerwillig.com; alena@hackerwillig.com; kristen@hackerwillig.com

5. On March 1, 2010, I caused to be deposited in the mails of the United States of America, via first class, postage prepaid envelopes, containing true and correct copies of the above-listed documents to the following parties at the addresses listed below:

Arlie & Company 2911 Tennyson Ave., #400 Eugene, OR 97408	Brad T. Summers Justin D. Leonard 101 SW Main #1100 Portland, OR 97204	Douglas R. Wilkinson 1011 Harlow Rd #300 Springfield, OR 97477
John D. Fiero 150 California St. – 15 <sup>th</sup> Floor San Francisco, CA 94111-4500	Jonathan Polland Rethink LLP 465 California St. #310 San Francisco, CA 94104	Linda F. Cantor Teddy M. Kapur 10100 Santa Monica Blvd – 11 <sup>th</sup> Floor Los Angeles, CA 90067
Michael P. Kearney POB 1758 Eugene, OR 97440	U.S. Trustee 405 E. 8 <sup>th</sup> Ave #1100 Eugene, OR 97401-2706	P. Rebecca Kamitsuka 405 E. 8 <sup>th</sup> Ave #1100 Eugene, OR 97401-2706
James R. Hanks JRH Transportation Engineering 4765 Village Plaza LP #201 Eugene, OR 97401	David E. Bomar Balzhiser & Hubbard Engineers, Inc. 100 W. 13 <sup>th</sup> Ave Eugene, OR 97401	Mike Broadsword Eugene Sand & Gravel POB 1067 Eugene, OR 97440
Gregory Brokaw Rowell Brokaw Architects, PC 1 East Broadway #300 Eugene, OR 97401	Jerry Vicars Fabrication & Mechanical Group Inc. POB 42173 Eugene, OR 97404	Douglas R. Schultz POB 1147 Eugene, OR 97440

1 2 3 John C. Fisher 767 Willamette St. #201 Eugene, OR 97401	James R. Hanks JRH Transportation Engineering 4765 Village Plaza LP #201 Eugene, OR 97401	NW Natural Gas Co.
4 5 Michael Roberts 1919 Myers Rd. Eugene, OR 97401	WmThomas Construction POB 2409 Florence, OR 97439	

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
6. I make the foregoing statements under the penalty of perjury.

DATED this 1<sup>st</sup> day of March, 2010, at Seattle, Washington.

/s/ Deborah R. Joslin

Deborah R. Joslin